

U.S. Senate
Republican Policy
Committee

Larry E. Craig, Chairman
Jade West, Staff Director

No. 97

Legislative Notice

Editor, Judy Gorman Prinkey

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S. 2176 — The Federal Vacancies Reform Act of 1998

Calendar No. 469

Reported to the Senate on July 15, 1998 with amendments by a vote of 9 to 1 (Senator Durbin voted nay). S. Rept. 105-250.

NOTEWORTHY

- On September 24, 1998, the Senate voted 96-1 to invoke cloture on the motion to proceed to S. 2176. The motion to proceed was approved by voice vote. A cloture petition was immediately filed on the bill. A cloture vote is scheduled for today, September 28, at 5:30 p.m., preceded by debate beginning at 3:30 p.m.
- S. 2176 is the Senate's response to the Administration's slowness in filling vacancies which are subject to the Senate's constitutional advice and consent role. The bill amends sections 3345 through 3349 of Title 5, United States Code, to clarify statutory requirements relating to vacancies in certain federal offices. Senator Byrd is among the bill's cosponsors.
- The Administration issued a veto threat on the bill as reported.

HIGHLIGHTS

S. 2176 applies to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions. It creates a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office.

The bill creates a reporting system to ensure that Congress, the President and the Office of Personnel Management are aware of any violations of the Vacancies Act as amended by S. 2176. Agencies would be required to report such information to the General Accounting Office.

The bill affects only vacancies that occur on or after the date of enactment.

BACKGROUND

Article II, Section 2 of the United States Constitution vests the President with the authority to appoint all officers of the United States, subject to the advice and consent of the Senate, but that Congress, by law, may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.

Congress has passed legislation that governs the use of temporary officials to perform the duties and functions of vacant positions that require the advice and consent of the Senate. However, over the years the length of time these temporary officials serve has grown despite Congress having set time limits. S. 2176 continues to respond to this long-standing area of dispute between the Senate and the Executive Branch.

The Justice Department has continued its longstanding contention that the Vacancies Act does not apply to its advice and consent positions. Justice maintains that its organic act, and the organic acts of other agencies, free it and other agencies from compliance. The Department takes the position that its enabling legislation places the power and functions in its head, the Attorney General, and therefore authorizes her to delegate powers and functions to subordinate officials as she sees fit. Justice also insists that the Attorney General's authority supersedes the Vacancies Act's restrictions on the temporary filling of advice and consent positions, thereby allowing her to designate acting officials indefinitely without submitting a nomination to the Senate to fill the position permanently.

In 1988 Congress passed amendments to the Vacancies Act but was unsuccessful in getting Justice's agreement that its advice and consent positions are subject to the Act. The Committee, given the growing number of federal departments and agencies now claiming exemption from the Vacancies Act, believes that "...Congress must now explicitly reject the position that general organic statutes for various agencies and departments ... trump the specific provisions of the Vacancies Act. Otherwise, the Vacancies Act will be of no practical effect, thwarting the constitutional mandate that persons serving in advice and consent positions do so through the Senate's approval of such Service."

The Committee also believes that the language of S. 2176 is needed now to place restraints on the presidency because presidents often appoint individuals to advice and consent

positions on a temporary basis and fail to provide nominations to the Senate for approval. According to the Committee, "The Vacancies Act limits presidential authority to make acting appointments, while preserving the Senate's power to advise and consent. Therefore, its scope must be government-wide unless Congress chooses clearly and specifically to exempt specifically identified officers from its reach when countervailing considerations apply.

Finally, the Committee believes that S. 2176 is needed to overturn part of a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998). In the case, the validity of an Office of Thrift Supervision administrative enforcement action was challenged by the bank subject to the order on the ground that the absence of a lawfully appointed director of the agency rendered the enforcement action void. The Court upheld the order.

The Committee is concerned about the Court's reasoning in the following excerpt from the decision: "Nothing the Act expressly deals with the amount of time that may transpire before the President exercises his sec. 3347 authority to designate a temporary replacement." The Court states further, "The time limit is placed not on Presidential action, but on the tenure of the President's designee."

The Committee disagrees strongly with the view of the Court and states in the report accompanying S. 2176, "...this portion of the court's opinion necessitates legislative action. Whether or not the court properly interpreted the existing law, the Committee believes that the 120-day time limit must run from the date of the vacancy caused by the death or resignation of the Senate-confirmed official, and not from the date that the President designates an acting official. A limit must be placed on the President's time to act to fill a position...a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides." [For a more complete description of this debate, see Report, pps. 2-5.]

BILL PROVISIONS

Section 1. Short Title — the "Federal Vacancies Reform Act of 1998."

Section 2. Federal Vacancies and Appointments. Amends Chapter 33 of title 5, United States Code, by striking sections 3345 through 3349 and inserting new language into each of those sections. The new language effectively replaces the existing law with a reformed version of the Vacancies Act. The change is designed to 1.) Create an effective enforcement mechanism and 2.) overturn a recent decision by the U.S. Court of Appeals for the District of Columbia in *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998).

S. 2176 provides that in the event of a vacancy in a position in an executive agency requiring Senate confirmation, the officer's first assistant is allowed to perform the duties of the office on an acting basis, for up to 150 days. Currently, the period is 120 days. The change is made to provide more time to complete the nomination and confirmation process. Under the new language the President can also appoint another person who has received Senate confirmation to serve for up to 150 days. However, the bill provides that the acting officer must have been the first assistant for 180 of the 365 days preceding the vacancy. An extension of 150 days may be obtained if the President sends up a nomination. But, if the nomination is withdrawn or the Senate rejects or returns it, the acting official may serve only for 150 days after that event.

The new language says that the Vacancies Act is applicable to all officers of executive agencies whose appointment to office is required to be made by the President by and with the advice and consent of the Senate. The Committee makes this change to make it clear that the Vacancies Act applies to all officers of all executive agencies and departments whose appointments require Senate approval, regardless of the department or agency's organic act.

S. 2176 also preserves a number of existing statutes that provide a process by which persons can serve as acting officers when particular offices are vacant. In most instances, these officials can serve until a successor is confirmed, without regard to the Vacancies Act.

As noted above, the Justice Department has consistently asserted that it is largely not subject to the Vacancies Act. S. 2176 is designed to thoroughly repudiate the contention that a law authorizing the head of a department to delegate or reassign duties among other officers is a law that provides for the temporary filling of a specific office.

A second enforcement process is created by the bill. If no nominee is submitted to the Senate within 150 days of the vacancy, then the office must remain vacant until a nomination is submitted. But, if the President submits a nomination any time after the 150 days, the acting officer would be allowed to serve while the nomination is pending in the Senate, until confirmation, or until 150 days after the rejection, withdrawal or return of the nomination. Any actions by an official serving in violation of this legislation would not have effect, and no one would be allowed to ratify the actions of the acting official that were taken in violation of the vacant office provisions.

Finally, S. 2176 creates a reporting mechanism to track vacancies. Under the bill, each executive agency must report to the Comptroller General any vacancies, the names of persons serving as acting officers and when their service started, names of nominees and when nominations are submitted to the Senate, and the final disposition of the nomination. The Comptroller would then notify the Congress, the President and the Office of Personnel Management when the 150 day limitations have been reached.

For a more detailed description of the mechanisms of S. 2176, the reader is directed to Section IV, pages 11 through 22 of S. Rept. 105-250.

ADMINISTRATION POSITION

The Administration, in a statement dated September 24, 1998, announced that it would recommend that the President veto the legislation unless it is substantially changed to reflect certain concerns. According to the Office of Management and Budget, "S. 2176 threatens the ability of the Executive branch to fulfill its statutory and constitutional obligations."

COST

The Congressional Budget Office reports that the legislation has no pay-as-you-go considerations and no impact on state, local, or tribal governments.

OTHER VIEWS

The Minority members of the Committee submitted views generally supporting S. 2176. However, they remain concerned that a number of provisions need to be altered.

POSSIBLE AMENDMENTS

Manager's amendment. Making technical corrections.

Other amendments may be offered in the event cloture were reached.

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